SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 22

RALEIGH SPELLER,

Petitioner,

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

No. 32

CLYDE BROWN,

Petitioner,

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray for a rehearing and a reversal of the judgment of this Court dated February 9, 1953, which

affirmed the judgment of the United States Court of Appeals for the Fourth Circuit, which in turn had affirmed the judgment of the United States District Court for the Eastern District of North Carolina. These actions, entitled as above, were prosecuted in this Court *In Forma Pauperis*. These petitions for rehearing are based upon substantial grounds available to petitioners, although not previously presented.

No. 22, *Speller* Case.

I

The Court should re-consider its conclusions that the unauthorized employment of an "Economic Basis" in selecting prospective jurors from the tax scrolls did not result in discrimination based solely on race, that such unauthorized employment of an "Economic Basis" was not evidence of discrimination in the selection of jurors based solely upon race, and that the unauthorized employment of an "Economic Basis" in selecting prospective jurors was not challenged by petitioner by his challenge to the Petitioner's trial jury, where his challenge was based upon the grounds that there had been discrimination in the preparation of the jury box from whence his jury was drawn, based solely upon race.

In the *Speller* case, the petitioner in his brief and argument on the question of discrimination in the selection of jurors in Vance County, North Carolina, from whence his trial jury was drawn, did not separately and specifically treat the question of the unauthorized use of an "economic basis" in the selection of taxpayers for jury service in Vance County. Nor did the respondent separately and specifically treat this matter, in its brief and argument to this Court or in any other Court. But, rather, the petitioner has consistently from the United States District Court

through this Court treated the uncontradicted evidence by the Clerk of the Vance County Board of County Commissioners that he had taken the "names of the people who had right much real estate" (R. pp. 36, 37, 49, 51), as indication of how discrimination based solely upon race had resulted and as uncontradicted evidence of such discrimination and had taken all as being included and encomposed in his challenge to the jury panel on the grounds of racial discrimination in the selection of taxpayers for jury service. It is here pointed out that because of the view held by both the District Court and the Court of Appeals, namely, that the Writ of *Habeas Corpus* was not available to petitioner, whose conviction had been upheld by the Supreme Court of North Carolina following his appeal from his trial in Superior Court of Bertie County, North Carolina, and where his petition to this Court to review to North Carolina Supreme Court's decision on Writ of Certiorari had been denied, the District Court and of the Court of Appeals, have not touched upon or considered this matter. Indeed, this unauthorized "economic basis" employed in composing the jury box from whence came petitioner's trial jury was not admitted and shown to have been employed until the United States District Court held hearing on petitioner's application for Writ of *Habeas Corpus*, the Clerk of the Vance County Board of Commissioners not having admitted this unauthorized procedure in the proceedings before the state courts. Hence the matter was not included in the state trial Judge's findings of fact which were adopted by the United States District Court (R. pp. 102 and 110) as its findings of fact. And as above mentioned, the United States Court of Appeals, because of its view of the law concerning the availability of the Writ of *Habeas Corpus*, never reached the merits of the issue (R. p. 153 to 156) of whether there had been unconstitutional discrimination based solely on race in the selection of jurors.

Petitioner respectfully submits to the Court that the employment of economic factors in selecting jurors, not sanctioned by state law, is within the prohibition of the Fourteenth Amendment when, as in this case, it does lead to discrimination against petitioner's race and must, as petitioner contends, invariably lead to such discrimination. That the Majority of Courts recognize that the "requirement of comparative wealth" effected discrimination against petitioner and his race can be seen from the Majority Opinion where it is stated: "If the requirement of comparative wealth is eliminated, and the statutory standards employed, the number would increase to the equality justified by their moral and educational qualification for jury service as compared with the white race." To the same effect is the statement in the Majority Opinion: "The action of the Commissioners' Clerk, however, in selecting those with 'the most property,' an economic basis not attacked here, might well account for the few Negroes appearing in the box." And these quoted statements, as do other statements in the Majority Opinion, indicate the majority's conviction that selection of jurors based upon "requirements of comparative wealth" must always result in discrimination against a Negro accused and his race. This Court has never before sanctioned a jury selection plan which in its very nature must lead to discrimination against a Negro accused, regardless of how well meaning were the intentions of the jury commissioners or jury officials. *Cassell* v. *State of Texas*, 339 U. S. 282; *Hill* v. *State of Texas*, 316 U. S. 400; and *Smith* v. *State of Texas*, 311 U. S. 128. And the Court has previously adhered to the policy of looking at the substance of the jury plan rather than its form to determine if there is unconstitutional discrimination *Caswell* v. *State of Texas*, *supra*, and *Smith* v. *State of Texas*, *supra*. Since, as petitioner herein point out, the employment of an economic

basis for selection of jurors was a mere vehicle by which unconstitutional discrimination was effected and petitioner contends that the issue was included in petitioner's challenge to the jury on the ground that there had been discrimination in the preparation of the jury box, petitioner has made out an uncontroverted case.

Moreover, the Majority of the Court concedes that the use of economic factors in the selection of jurors has no sanction in the laws of North Carolina and was an "innovation" introduced by the Clerk of the Vance County Board of Commissioners. While the petitioner in his brief and argument did not separately and specifically treat this phase of the case, as above explained, when this unauthorized and illegal procedure is laid beside the fact that previous to 1949 there had been discrimination in the selection of jurors in Vance County, as is recognized by the Majority of the Court; that the Clerk of the Board had served the boards in Vance County for 18 years in the matter of assisting with the preparation of the jury lists (R. p. 40) and gave no evidence of repentence; that the record is silent of any change of policy on the part of jury officials during 1949 as to inclusion of Negro jurors, attesting to a continuation of the same policy followed previous to 1949 (R. pp. 40, 60, 64, 67, 74, 77, 79); and the fact that only 7% of the names in the jury box were names of Negroes this unauthorized and illegal use of economic factors takes on a different hue than that of a mere irregularity, and it is seen as a part of a general picture of racial discrimination in the selection of jurors. In petitioner's brief and argument he did not treat these "economic factors" separate from the whole picture or attempt to show the interplay of "economic factors" with other phases of the entire picture. Nevertheless, the Opinion of the Court gives these economic factors a separate and distinct treatment and greater weight.

In a case decided by the Supreme Court of North Carolina since the decision of this Court in the instant cases (*State* v. *Mack Ingram*, 237 N. C. 197, — S. E. (2d) —, reversed on other grounds), the North Carolina Supreme Court, in treating a contention of the defendant that he had been denied equal protection of the laws in his trial in the Superior Court of Caswell County through discrimination against members of his race, to wit, Negroes, in the constitution of juries in said County, said:

> "In view of our conclusion that the motion for judgment of nonsuit should have been allowed, we do not reach the question raised by the defendant's appeal, whether there was any evidence to support the finding by the trial judge that there had been no intentional or systematic exclusion of negroes from jury service in Caswell County. Akins v. Texas, 325 U. S. 398.
>
> "But we deem it proper to call attention to the testimony tending to show that the Board of County Commissioners of Caswell County had not observed the statute in making up the jury lists of the County. The Chairman of the Board testified that in selecting jurors to serve in the Superior Court the custom prevailed of getting from the election registration books the names of prospective jurors and putting them in the box, and that from the lists thus obtained the requisite number of names were drawn to serve as jurors at each term of court. The statute G. S. 9-1 provides that the Board of County Commissioners shall biennially cause their Clerk to lay before them the tax returns of the preceding year from which they shall select the names of all such persons as have paid their taxes and are of good moral character and of sufficient intelligence to serve on juries. This statute was amended by Chap. 1007 Public Laws of 1947 to add the further provision that the commissioners shall cause their Clerk to lay before them also a list of names of persons resident and twenty-one years of age who do not appear on the tax returns from which the commissioners shall select the names of those of good

moral character and sufficient intelligence. It is further provided in the Act that the Clerk, in making out the lists from such reliable sources of information as will provide the names of those qualified for jury duty.

"In State v. Brown, 233 N. C. 202, 63 S. E. 2d 99, Chief Justice Stacy interpreted this statute as follows: 'Prior to 1947 it was provided by G. S. 9-1 that the tax returns of the preceding year for the county should constitute the source from which the jury list should be drawn, and this was then the only prescribed source. To meet the constitutional change of the previous election making women eligible to serve on juries, the statute was amended in 1947 enlarging the source to include not only the tax returns of the preceding year but also 'a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age,' to be prepared in each county by the Clerk of the Board of Commissioners.'

"Said Justice Walker in State v. Mallard, 184 N. C. 667 (674), 114 S. E. 17: 'It is not for the commissioners, or others selected to perform public duties, to substitute for the methods chosen by the Legislature those of their own as being more desirable and better adapted to accomplish the end in view.' And as expressed by Justice Brogden in Hinton v. Hinton, 196 N. C. 341, 145 S. E. 615: 'It is clear, therefore, that the law not only guarantees the right of trial by jury, but also the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law."

II

The Court should re-consider its conclusion that the method pursued by the jury commissioners in choosing juries in Forsyth County Indicates an Abandonment of discrimination against negroes in the constitution of juries in Forsyth County since the decision of this Court in Brunson et als. v. North Carolina, rather than a studied and purposeful limitation of Negroes on juries in said county as contended by petitioner.

In the *Brown* case, petitioner in his brief and argument did not present the issue of discrimination against Negroes in the constitution of juries in Forsyth County in the manner in which the Majority Opinion of the Court indicates is expedient and necessary, namely, that by means of uncontradicted evidence petitioner made out a *prima facie* case, thereupon shifting the burden of rebutting such case upon the Respondent, which case, petitioner submits, is not rebutted by the record. It cannot be denied that as of the *Brunson, Jones, Jones, King* and *Watkins* cases (333 U. S. 851), this Court found as a fact that discrimination had been practiced against Negroes by the jury commissioners of Forsyth County in the constitution of juries in said county. The record in the instant case shows that since the decision of this Court in the abovenamed cases, said jury commissioners have, if at all, altered their practices in this respect only as a matter of degree, that is, have undertaken what they deem to be compliance with the edict of this Court in said cases by putting a few Negroes on grand and petit juries here and there, a token compliance, and under circumstances which indisputably show a policy of limiting Negroes on juries in Forsyth County (R. pp. 38-39, 42-44). This Court had occasion to consider the identical situation in the

cases *Hill* v. *Texas*, 316 U. S. 400 and *Cassell* v. *Texas*, 339 U. S. 282; both involving Dallas County, Texas. In between the *Hill* case and the *Cassell* case, the jury commissioners of Dallas County, in either a good faith or bad faith attempt to comply with the edict of this Court in the *Hill* case, resorted to including the name of only one Negro on the list of grand jurors drawn for said County. This Court in the *Cassell* case held that such a situation did not indicate a change to a constitutional method of selecting juries, but, on the other hand, disclosed the continuation of an unconstitutional method of so doing, and petitioner contends that the same situation exists in his case, that by means of evidence uncontroverted in the record, he has disclosed a practice on the part of jury commissioners in Forsyth County of limiting the number of Negroes on juries in said county since the *Brunson* and companion cases, thus making out a *prima facie* case of discrimination, that the burden of rebutting such case then shifted to the Respondent, and that the Respondent failed to carry that burden by showing that the consistent presence of only a few Negroes on juries in said county was due to other than racial reasons.

Further, petitioner has not heretofore argued to the Court that the alleged 1949 purge of the jury box of Forsyth County has any necessary significance on the issue of whether or not there has been any change of practice on the part of the jury commissioners of said county. Under the laws of North Carolina (G. S. 9-1), all counties are required to purge their jury box every two years, in the odd years, and this is required without regard to presence or absence of any issue of discrimination in the selection of juries. Thus, the purge of a jury box in any given instance may be presumed to be done in compliance with statutory requirement, rather than be interpreted as an effort on the part of the commissioners to alter some course of prior unconstitutional administration

of their duties. In such circumstances, it would appear to be hardly possible to attribute the position of Negroes with respect to Forsyth County juries in either the pre-*Brunson* or post-*Brunson* drawings of juries entirely to chance or accident.

Nos. 22 and 32, *Speller* and *Brown* cases.

III

The Court should re-consider its conclusion that the District Court's error in giving weight to this Court's prior denial of certiorari was inconsequential and did not affect its determination that there was no merit in petitioners' applications for the writ of habeas corpus.

Petitioner did not discuss or consider in their brief and argument what influence the District Court's giving weight to denial of certiorari by this Court had on said Court's determination of petitioners' cases on the merits, nor the legal propriety of said court's action in this respect. It cannot be doubted on the record in these cases that the District Court's opinion as to the effect of the denial of certiorari by this Court was of paramount, if not controlling, importance in his decision in said cases.

In the *Speller* case, as heretofore pointed out, the issue of the use of "economic factors" in the selection of juries in Vance County was first discovered during the habeas corpus hearing in the District Court. Nevertheless, the District Court adopted the state trial court's findings of fact which included no such evidence on or consideration of the economic basis used in jury selections in said county. It is respectfully submitted that had the weight which the District Court gave to this Court's denial of certiorari not affected the District Court's determination on the merits, that he would have made his own findings

of fact or at least made some mention to the use of the "economic basis." It is observed that the "economic basis" is the *sine qua non* of the conclusion reached in the Majority Opinion that there has been no racial discrimination in Vance County jury selection affecting petitioner.

Similarly, in the *Brown* case, the summary manner in which the District Court dismissed petitioner's petition for writ of habeas corpus, as well as the opinion of the Court, indicates that said Court was led in its determination by its views on the effect of the denial of certiorari.

Conclusion

It is respectfully prayed that these Petitions for Rehearing be granted and that upon such rehearing the judgments of this court herein be reversed.

Respectfully submitted,

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CLYDE BROWN,
Petitioners.

HERMAN L. TAYLOR,
Counsel for Petitioners.

SAMUEL S. MITCHELL,
Of Counsel.

Certificate

Counsel for Petitioners certify that these petitions for rehearing are presented in good faith and not for delay, and that the petitions are restricted to the grounds above specified.

HERMAN L. TAYLOR,
Counsel for Petitioners.